



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 26, 1998

Mr. Scott A. Durfee
General Counsel
Office of the Harris County District Attorney
District Attorney's Building
201 Fannin, Suite 200
Houston, Texas 77002-1901

OR98-0248

Dear Mr. Durfee:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 111968.

The Harris County District Attorney (the "district attorney") received two requests for information concerning Cause No. 648981. You claim that certain documents are excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.301(a) requires a governmental body to release requested information or to request a decision from the attorney general within ten business days of receiving a request for information the governmental body wishes to withhold. When a governmental body fails to request a decision within ten days of receiving a request for information, the information at issue is presumed public. Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. *See Hancock*, at 381.

The first request, which the district attorney received on September 4, 1997, identified three categories of information being sought: (1) supplemental police report, (2) DNA test, and (3) polygraphs. The second request was received by the district attorney on October 15, 1994, and seeks eight categories of information, including the three categories sought by the first request. You did not request a decision from this office until October 29, 1997, more than ten business days after the district attorney received the first request. Consequently, the district attorney has not met its statutory burden regarding the three

categories of documents originally requested and included in the second request. Therefore, for these three categories of information, we will consider only the compelling arguments against disclosure that you have raised.¹

You claim that the information submitted in Appendix A is excepted from public disclosure by section 552.101 in conjunction with common-law privacy and various statutes. Section 552.101 excepts from required public disclosure information that is considered confidential by law, either constitutional, statutory, or by judicial decision. You claim that certain medical records submitted in response to the request are confidential under the Medical Practice Act. Section 5.08 of the Medical Practice Act, V.T.C.S. article 4495b (the "MPA"), provides:

(a) Communications between one licensed to practice medicine, relative to or in connection with any professional services as a physician to a patient, is confidential and privileged and may not be disclosed except as provided in this section.

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

In addition, section 5.08(j)(3) provides for further release of confidential medical records obtained with a valid consent for release only if the disclosure "is consistent with the authorized purposes for which consent to release the information was obtained." *See also* V.T.C.S. art. 4495b, § 5.08(c). We have reviewed the information submitted in Appendix A. We have marked the information which comes within the purview of the MPA and must be withheld from disclosure in conjunction with section 552.101 of the Government Code.

You also argue that any polygraph reports within the files are confidential. Although we do not find any such information among the submitted documents in Appendix A, we generally agree. Texas law prohibits the public disclosure of the results of polygraph examinations. V.T.C.S. art. 4413(29cc). Thus, the district attorney is barred from releasing the *results* of the polygraph examinations to anyone except as specifically provided by section 19A of article 4413(29cc), V.T.C.S. *See also* Open Records Decision No. 430 (1985). The mere fact that a polygraph examination has been conducted, however, is not confidential under the statute and must be released.

We note that among the documents in Appendix A are a search warrant and affidavit in support of the warrant. As it appears that the search warrant has been filed with a court,

¹Generally, sections 552.103 and 552.108 do not provide compelling demonstrations to overcome the presumption of openness. *See, e.g.,* Open Records Decision Nos. 630 (1994), 473 (1987), 434 (1986).

it is part of the public record and must be released. *Cf. Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992). Similarly, if the probable cause affidavit was made to support a search warrant, the affidavit is public by statute if it has been executed, and it must therefore be released to the requestor. *See* Code Crim. Proc. art. 18.01(b).

Section 552.101 also encompasses common-law privacy. Information may be withheld under section 552.101 in conjunction with common-law privacy (1) if the information contains highly intimate or embarrassing facts about a person's private affairs such that release of the information would be highly objectionable to a reasonable person, and (2) if the information is of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information such as that relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. Generally, the identity of victims of serious sexual offenses and the details of those offenses are protected by privacy. Open Records Decision No. 393 (1983). However, if those identities and details have already been made public during the prosecution, such information may not be protected by privacy. *See Star Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992); *Star Telegram, Inc. v. Doe*, 915 S.W.2d 471, 474-475 (Tex. 1995). Therefore, to the extent that the identity of the victim and the details of the offense have previously been made public, the district attorney may not withhold this information based on common-law privacy in conjunction with section 552.101 of the Government Code.

Finally, you assert that section 552.108(a)(3) protects the document you submitted to this office as Appendix B. We note that Appendix B is responsive only to the second request. Because the district attorney has met its statutory burden regarding this information, we will consider your section 552.108(a)(3) arguments against disclosure. Section 552.108 provides in part:

(a) [i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of 552.021 if . . . (3) it is information that: (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

You argue that the submitted document in Appendix B constitutes attorney work product under section 552.108(a)(3). Upon review of the document, we agree that this record deals with the prosecution of crime and reflects the mental impressions or legal reasoning of an attorney representing the state. *See* Gov't Code § 552.108(a)(3)(B).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,

A handwritten signature in cursive script, reading "Vickie Prehoditch".

Vickie Prehoditch
Assistant Attorney General
Open Records Division

VDP/glg

Ref.: ID# 111968

Enclosures: Submitted documents

cc: Ms. Angela Clark
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(w/o enclosures)